

No. 89-667

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SHIRLEY LOFTIS,
Petitioner,
vs.
LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the findings of the Trial Court should be upheld as not "clearly erroneous"?
2. Whether the Trial Court's determinations with respect to individual liability, the dismissal of the named individuals, and the immunity defense are appropriate under the facts as found? Or, alternatively, whether the Court of Appeals' determination suffices to eliminate individual liability?
3. Whether the Lower Courts' determinations with respect to Petitioner's disparate treatment claims should be upheld as not "clearly erroneous" under the proper legal standards?
4. Whether the Lower Courts' determinations with respect to Petitioner's disparate impact claims should be upheld as not "clearly erroneous" under the proper legal standards?
5. Whether the Lower Courts' determinations with respect to Petitioner's age discrimination and pendent State claims should be upheld as not "clearly erroneous" under the proper legal standards?

PARTIES TO THE PROCEEDINGS

Respondents agree with Petitioner's listing of the parties to this proceeding.



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In The
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DISTRICT, et al.,
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BRIEF IN OPPOSITION TO
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STATEMENT OF THE CASE

Respondents have few agreements with Petitioner's version of the facts. While there are occasions throughout her "Statement of the Case" where there is a reference to a pertinent document (e.g., the decision of the Trial Court or the Court of Appeals), the represented version of the "facts" misrepresents the record, is outside the record, or mischaracterizes or misrepresents the decisions of the Trial Court and the Court of Appeals. In the few instances where it can legitimately be said a representation is drawn from the record, the source is nothing other than the testimony of Petitioner, her husband, or her expert witness: *i.e.*, her version of events. Unfortunately for Petitioner, neither the Trial Court nor the Court of Appeals accepted her version of events.

Admittedly, the whole record is not before this Court. But the Court is not a trial court, nor was the Court of Appeals. The pertinent factual determinations for the appeal are derived from the Opinion of the Trial Court. (Appendix A to the Petition) The findings of that Court form the basis for review and, under the law, will not be disturbed on appeal unless they are "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504, 1512 (1985).

For purposes of this Opposition, Respondents will be generally content to register their strong opposition to Petitioner's representations, and to refer the Court to the Opinions of the Trial Court (Appendix A to Petition) and the Court of Appeals (Appendix C to Petition) for the factual context in which the appeal should be decided. Some specific instances where Respondents believe greater elaboration — drawn from the record — is appropriate will be identified below.

If this case is factually reviewed upon the findings of the Trial Court, the following assertions, among others, made by Petitioner simply cannot be sustained:

- The Respondent District's promotional selection system has "five pass/fail barriers," one of which is the "subjective recruitment-training barrier." (Petition, pp. 3, 5) This is merely Petitioner's point of view, not accepted by the Trial Court.
- "A white male was 4.5 times as likely as a white female to be an administrator," and other, similar assertions. (*Id.*, at pp. 4-5, 15) These are also mere assertions, not accepted by the Trial Court.
- "The subjective 'direct appointment' barrier caused disparate impact against white

females and females . . ." (*Id.*, at p. 7) This issue will be commented on more fully, below. This alleged "finding" was not made by the Trial Court, and the Court of Appeals erroneously concluded that Respondents failed to deal with the issue. (See Appendix C to Petition, at p. C6)

- With respect to her disparate treatment allegations, while Petitioner "established a *prima facie case*," Respondents' rebuttal was based on an "after the fact rationale" and was "based on a *comparison between Loftis and the 'perfect' or 'ideal' administrative applicant . . . 'a perfect 10' . . .*" (Petition, at pp. 11, 14, 20, emphasis in original) These new assertions are pure fiction and bear no relation to the Trial Court's findings.
- The effect of the Respondents' "informal affirmative action plan" is to "promote unlawfully black males at a rate that ranged from 7 to 43 times the rate for white females." This, too, is merely Petitioner's assertion, not the finding of the Trial Court.
- "Loftis established *prima facie cases* for ten different administrative positions between 1964-80." (*Id.*, at p. 20) This "finding" does not appear in the Trial Court's decision. More importantly, the question is not the *prima facie case*, but the entirety of the evidence and the Trial Court's findings based thereon.

There are other distortions in Petitioner's version of the facts. What is being reviewed are the Trial Court's findings.

While the Trial Court determined that the "continuing violation doctrine" allowed it to "reach the merits of the matter" (Appendix A to Petition, at pp. A14-15), the effect of this is not entirely clear. Allegations of discriminatory conduct within the statute of limitations periods under the various laws were appropriately before the Court. These periods would certainly encompass times at Dominguez Elementary School after 1978, at least under certain limitations periods. The appropriate time frames would also certainly cover Petitioner's applications for the position of Assistant Principal in 1979 and 1981, which were indeed the focus of a significant part of the testimony in the trial.

If the Trial Court's determination was that the pre-statute of limitations allegations of disparate treatment were appropriately before the Court, Respondents respectfully disagree. However, the Trial Court's Memorandum Opinion, taken as a whole, clearly indicates that the Court found in favor of Respondents on *all* allegations of disparate treatment at *any* time. (See Appendix A to Petition, at pp. A19-23) The Court of Appeals agreed. (See Appendix C to Petition, at pp. C4-5)

For purposes of this appeal, those findings should be conclusive. Respondents do believe, however, that the only properly contested issues of fact and law are allegations of disparate treatment and disparate impact (regarding the examination process) within the limitations periods. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed.2d 571, 97 S.Ct. 1885, at 1889 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299, 53 L.Ed.2d 768, 97 S.Ct. 2736, at 2742 (1977).

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS HANDLER, GILBERT, AND LILLEY; IN THE ALTERNATIVE, THE COURT OF APPEALS' DETERMINATION SUFFICES TO ELIMINATE INDIVIDUAL LIABILITY.

Respondent Handler was the Superintendent of the District from 1980 through 1987. *The only factual allegation Petitioner made concerning him pertains to an alleged meeting in June of 1975.*

Respondent Lilley was a Field Specialist in the personnel office which served Petitioner and hundreds of other schools, from 1971-1980. His duties in that position related to the staffing of the schools under his jurisdiction and related personnel matters.

His contacts with and concerning Petitioner related to the period 1974-1976. Petitioner testified in her deposition (Vol. I, pp. 87-91) that she had no direct involvement with Respondent Lilley after October 1, 1976.

Respondent Gilbert is retired from the District. Mr. Gilbert was the "Deputy Area Administrator" for most of the time involved in the lawsuit, excepting the 1968-1970 period. He assisted the Area Superintendent in the supervision of the Area's schools. *His contacts with Petitioner took place from 1965 to 1968, and from 1974 to 1976.*

Respondent Gilbert was not involved in any way in the promotional selection process, nor did he ever evaluate or rate Petitioner as a promotional candidate.

Given the above facts, the Trial Court properly granted summary judgment in favor of these three defendants. They were clearly entitled to immunity (see Point II, below), even assuming involvement; and Petitioner's allegations were beyond any conceivable statute of limitations. *Harlow v. Fitzgerald* 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1981); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed.2d 571, 97 S.Ct. 1885 (1977).

The Court of Appeals did not reach this issue, or the immunity one, below. (Appendix C to Petition, at p. 10) Since Respondents agree with the Court of Appeals on the disparate treatment issue, that basis for decision is certainly acceptable to them — even though the summary judgment and immunity decisions of the Trial Court are, in Respondents' opinion, unimpeachable.

II.

AS THE TRIAL COURT FOUND, ALL NAMED INDIVIDUAL DEFENDANTS ARE ENTITLED TO IMMUNITY FROM LIABILITY; OR, AGAIN, THE COURT OF APPEALS' ALTERNATIVE BASIS FOR DECISION SUFFICES TO ELIMINATE INDIVIDUAL LIABILITY.

Wood v. Strickland, 420 U.S. 308, 316-322; 43 L.Ed.2d 214, 222-225, 95 S.Ct. 992 (1975); and *Owen v. City of Independence, Missouri, et al.*, 445 U.S. 622, 657, 63 L.Ed.2d 673, 697, 100 S.Ct. 1398 (1980) compel this conclusion.

These cases clearly and definitively establish that the named individuals are entitled to immunity so long as their acts are in good faith, within the scope of their employment, and not done with intentional or reckless disregard of Petitioner's constitutional or other legal rights.

The immunity defense applies to individual respondents, justifying the summary judgment, the F.R.C.P. Rule 41(b) dismissal, and the judgment in favor of respondent Lingel at the close of all evidence.

All of the Respondents except Dr. Handler and Mr. Lilley testified at trial. Despite Petitioner's preoccupation with *prima facie* case determinations, the fact that the Trial Court found, after considering *all* the evidence at the end of the trial, that *all* named defendants acted in good faith, in accordance with all applicable rules, and did not intentionally otherwise discriminate or retaliate against Petitioner, justifies the ultimate judgment in favor of Respondents on the immunity defense. (Appendix A to Petition, at p. A24) *See also U.S. Postal Service v. Aikens*, 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983) (regarding improper preoccupation with *prima facie* case, given the totality of the evidence).

III.

THE JUDGMENT SHOULD BE AFFIRMED ON THE DISPARATE TREATMENT CLAIMS.

The Trial Court's findings and conclusions are supported by the record and are not "clearly erroneous." In this case Respondent seems preoccupied with the question as to whether or not a *prima facie* case had been established. The proper analysis is to examine the record as a whole and the Trial Court's Memorandum Opinion in its entirety. *See U.S. Postal Service v. Aikens, supra*, where the Court said: "Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*." 103 S.Ct., at 1481.

Similarly, in this case there has been a trial on the merits. The Trial Court's Opinion must be viewed in its entirety, not by taking individual phrases out of context and substituting the part for the whole. Respondents submit that the Trial Court properly understood its role in this case, properly understood the burden of proof, and entered judgment against Petitioner on the merits based on the entire record before it.

The Trial Court clearly understood that, in Title VII cases (42 U.S.C. Section 2000(e) *et seq.*), a plaintiff must prove a *prima facie* case of actual disparate treatment, after which the employer must, if it is to prevail, merely articulate some legitimate, non-discriminatory reason for its actions. If that is done, the plaintiff then has the burden of proving that the claimed reason for

defense was merely a pretext. (See Appendix A to Petition, at pp. A16-19)

The employer does not have to prove the absence of a discriminatory motive, does not have to prove its defense by a preponderance of the evidence, and does not have to prove the persons selected were more qualified than Petitioner by objective evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

The burden of proof on the plaintiff to demonstrate intentional discrimination is equally as high, if not higher, in cases brought under 42 U.S.C., Sections 1981 and 1983. The same ultimate burden of proof to demonstrate intentional discrimination is required. Even if disproportionate impact exists, such does not establish a violation. Discriminatory purpose must be shown. Petitioner must prove discrimination on the basis of race, sex, or age. *Washington v. Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976); *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 73 L.Ed.2d 835, 102 S.Ct. 3141 (1982).

Moreover, to the extent Petitioner attempts to impose Section 1983 liability on the school district itself, she must prove that a policy, custom, ordinance, regulation, or decision officially adopted or promulgated deprived her of her constitutional or statutory rights. A local government is not liable under a theory of respondeat superior. *Monell v. Department of Social Services, City of New York, et al.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978).

That the Trial Court properly understood its role in the disparate treatment determination is evident from the

discussion at pp. 20-22 of its Memorandum Opinion. (Appendix A to Petition, pp. A20-22) The Court sets forth the burden of proof standards which are established by the Supreme Court cases cited above, particularly *Burdine* and *Aikens, supra*, after which the Court concluded: "After considering all of the relevant evidence, the Court finds that these named defendants . . . did not intentionally or otherwise discriminate or retaliate against Plaintiff . . . for any prohibited reason, including but not limited to her age, sex, or race." (*Id.*, at p. A24) The Court also concluded that: "No protected activity undertaken by plaintiff was the basis or reason for any of the acts or omissions of the defendants. There is no evidence of harassment or retaliation." (*Ibid.*)

As the Court of Appeals determined (Appendix C to Petition, at pp. C4-5), the Trial Court's findings must be affirmed as appropriate and not "clearly erroneous." It should be noted that the Trial Court was well aware that, after the Respondents have articulated a legitimate, nondiscriminatory reason for their actions, it is incumbent upon the Petitioner "to counter such evidence and offer proof as to pretext before resting." (Appendix A to Petition, at p. A22) Thus, the only fair reading of the Trial Court's Memorandum Opinion is, as the Court of Appeals determined (Appendix C to Petition, at p. C5), that the Trial Court found that, even if Petitioner proved a *prima facie* case, (1) Respondents had met their burden of proving legitimate nondiscriminatory reasons, (2) Petitioner had not proved intentional discrimination, and (3) Petitioner had not countered the Respondents' explanation by proof of pretext. The judgment on the disparate treatment claims should be affirmed.

IV.

THE JUDGMENT SHOULD BE AFFIRMED ON THE DISPARATE IMPACT CLAIMS.

A. The Trial Court Correctly Found That There Was No Adverse Impact In The Training And Experience Component Of The Examination Process. Petitioner's Assertions About A "Recruitment/Training Component" Are Without Merit.

In the first place, it must be emphasized that this action was brought by an individual only. It was not a class action. Petitioner exercised her right to opt out of a class action suit which had been brought by and on behalf of the class of women administrators, and potential administrators, within the District. *Szewiela v. Los Angeles Unified School District*, U.S. District Court, Central District of California, Case No. CV 80-03348 WMB, which resulted in a Consent Decree on behalf of the identified class. Said decree (Ex. 52) is still in effect. Additionally, Petitioner, despite all of the unsubstantiated rhetoric of her petition with respect to the "recruitment/training component" and the "application component" of the District's selection process, *did* apply for the position of Assistant Principal, Elementary, in 1979 and 1981. (The dispute regarding the 1977 application period is outside the statute of limitations.)

Under the record of this case, the *only* position Petitioner applied for and therefore the *only* challenge that Petitioner has standing to raise, relates to Assistant Principal, Elementary. Moreover, the *only* component of

the selection process that Petitioner failed, in both 1979 and 1981, is the Training and Experience portion of the selection process. Petitioner simply does not have standing to complain about alleged failures of others to apply, nor about any component of the selection process except the one *she* failed, the T&E portion. Thus, it was entirely appropriate for the lower courts to concentrate upon T&E portions of the exam process in their evaluation of the disparate impact claim. (The "direct appointment" process will be dealt with, below.)

With respect to disparate impact cases, there is a battle of statistics and experts as to what constitutes "adverse impact." Petitioner has the burden of proof to demonstrate "adverse impact" upon women, whites, and persons over forty, without which there is no disparate impact case. Petitioner must prove a substantial, *statistically significant*, adverse effect upon the protected class. *Castenada v. Partida* 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977); *Connecticut v. Teal* 457 U.S. 440, 73 L.Ed.2d 130, 102 S.Ct. 2525 (1982)

To put this case in its proper context, Petitioner is a teacher. It has been a source of embarrassment to her that she has remained a teacher. (See Appendix A to Petition, at p. A27) She has applied for promotional positions in a civil service type promotional system, and has been unsuccessful in the Training and Experience portion, which compares her training and experience in relation to the hundreds of other candidates who have applied for the positions. What she describes as a "recruitment-training component" is nowhere identified as such in the findings of the Trial Court.

The reason Petitioner wishes to identify this as a "component" of the examination process is so that she can apply a *disparate impact* analysis to it. What she is identifying as a "barrier" and a "component" of the

selection process is the existential fact of being a teacher in the system. It is not a "process" or a "component" of the selection system in any intelligible sense.

Petitioner's motive in so mischaracterizing the facts and the Trial Court's findings (or is she not implying that the Trial Court agreed with her characterization?) is obvious: since her disparate impact case is virtually predicated on the utilization of the *elementary teacher population* as the proper group for comparison purposes, she must make every effort she can to tie in to that group as a defined *applicant group* for purposes of examining disparate impact.

But the elementary teachers of the District are not the proper group for this purpose, nor are they the "applicants" in the examination process. The qualified labor pool are those teachers who possess *administrative credentials*. The *applicants* are those who in fact possess these minimum qualifications and *actually apply*.

Despite Petitioner's obfuscation, there is really no mystery to determining the relevant labor force and the applicants for the examination process. *Treatment of a teacher is not part of the examination process*. The Trial Court understood the proper labor force for comparison purposes, as it time and again "found" that the "prima facie" statistics utilized by Petitioner were not proper for comparison purposes:

"This [Petitioner's Ex 422] , however, is not a true 'adverse impact' study because it is not based on the actual labor pool of qualified elementary teachers, those possessing administrative credentials." (Appendix A to Petition, at p. A27. See also p. A28)

The Trial Court clearly accepted Respondents' statistics and expert testimony regarding the application process (which starts with an application by one possessing minimum qualifications) and the qualified labor pool for comparison purposes:

"[Regarding adverse impact] This Court specifically finds that the conclusions [*i.e.*, no adverse impact] reached by defendants' witness Dr. David Friedland are true and correct under the facts of this case and the statistical evidence introduced, and hereby adopts and incorporates Dr. Friedland's conclusions, as set forth in Exhibit 158." (Appendix A to Petition, at p. A31)

A copy of Exhibit 158 is attached to this Opposition as Appendix A. The Court of Appeals, while concluding that there were other areas that needed to be addressed (but see below), upheld the finding of no adverse impact vis-a-vis the relevant labor pool, as it applied to whites and females (and further upheld the finding of job relatedness or business necessity of the Training and Experience examination). (Appendix C to Petition, at pp. C6-8)

These determinations are completely in accord with the facts and the law. The recent case of *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. __, 109 S.Ct. 2115 (1989), drawing upon *Hazelwood, supra*, is completely dispositive on this point.

Without question, the ability of Petitioner to achieve prepromotional opportunities was, and is, an appropriate subject of analysis. It is, however, properly analyzed in a *disparate treatment* analysis, because Petitioner's assertions are that she was not given the same kinds of opportunities that males were or that minorities were. As indicated above, the lower court's determinations

totally refute these assertions. Petitioner cannot also analyze this series of allegations under a *disparate impact* process, because it is not susceptible of that analysis. There is no "recruitment-training component" of the examination process; it is not a part of an examination process that a person "fails." Nor is the "application process" an appropriate subject of scrutiny from this Petitioner. She was never "chilled" from applying. (*In fact, the Trial Court found that there was no chilling effect at all in the process.* See Appendix A to Petition, at p. A25.) She applied for all examinations for Elementary Assistant Principal within the statute of limitations, and was unsuccessful on the Training and Experience component of that process. That component is properly the focus of disparate impact analysis.

B. The "Issue" Of A Separate Disparate Impact Analysis For White Females Is A Non-Issue: Even If Such Is An Appropriate Analysis, The Record Demonstrates There Was No Adverse Impact Against White Females.

Petitioner and the Court of Appeals (See Appendix C to Petition, at pp. C6-7) fault the District for not providing a separate analysis of disparate impact with regard to white females, suggesting that if this had been done the result would have demonstrated adverse impact. This is simply not the case. As will be seen, Petitioner's own exhibit, showing white females as a separate group, proves that there was no disparate impact with respect to white females. If one is to believe the arguments put forth by Petitioner, white females are less successful in competing for promotions to Assistant Principal,

Elementary than are black females, black males, and white males. To illustrate this, Petitioner presented a statistical table on page 20 of her Opening Brief for her appeal to the Ninth Circuit. (A copy of this is provided in Appendix C to this Opposition.) Petitioner's analysis of the data presented in the table was based on the erroneous premise that the proper reference group for analysis of the number of candidates passing the examination and being promoted was the population of all elementary school teachers in Respondent District. This premise flies in the face of the Uniform Guidelines on Employee Selection Procedures, which were introduced as an exhibit and were the subject of expert testimony. The Uniform Guidelines indicate that the proper reference group for determination of disparate impact of employee selection procedures is the group of applicants for employment:

"The selection rates for males and females are compared alone; and the selection rates for the race and ethnic groups are compared with the selection rate of the race or ethnic group with the highest selection rate. There is no obligation to make comparisons for sub groups (e.g., white male, white female, black male and black female)." (Question and Answer 11 to Uniform Guidelines, Exhibit 269 in the case.)

As the Trial Court found, in the case of Assistant Principal, Elementary, the population of all elementary teachers does not meet the test of being a qualified and available labor force. Not all elementary teachers are qualified, since not all teachers possess the administrative credential which is legally required for assignment to the class of Assistant Principal. In addition, only those teachers who apply to take the examination are "available." It was well established at trial that exami-

nations for Assistant Principal, Elementary are well publicized, and that any teacher meeting the minimal requirements is welcome to complete an application form, thereby becoming an applicant. The Trial Court found no evidence that any group of potential applicants was chilled from applying. As a result, it is reasonable to consider that the group of qualified applicants constitute the "qualified and available work force." The population of all elementary school teachers does not fit this definition, since most of that population are not qualified, in that they do not hold the required credential, and/or did not make themselves available by filing an application form, even though the scheduled examinations were well publicized.

Contrary to Petitioner's assertions, when her statistical table is properly analyzed, it is apparent that white women did better than did any other group. The following table illustrates this point. The table utilizes Petitioner's exhibit and shows the number of elementary teachers, the number applying, and the number being promoted as a result of five consecutive examinations for Assistant Principal, Elementary, between the years of 1972 and 1979. (See Appendix C herein)

Table 1: Applications and Promotions, Assistant Principal, Elementary School,
1972-1979

* Added by Respondents to Petitioner's compilation presented to the
Court of Appeals (see p. 20, below).

Promo. Cycle Date	Nos. & Ratios	Fem. Wh.	Fem. Bl.	Fem. Other	Male Wh.	Male Bl.	Male Other
1972	Tchrs.	7,388	1,863	1,000	1,265	236	136
	No. Appl.	27	33	9	70	28	17
	Pct. Appl.	0.4	1.8	0.9	5.5	11.9	12.5
	No. Promo.	13	7	0	13	10	0
	* Pct. Promo.	48.1	21.2	0.0	18.6	35.7	0.0
1974	Tchrs.	7,099	2,158	1,624	1,213	231	247
	No. Appl.	39	56	18	69	43	25
	Pct. Appl.	0.5	2.6	1.1	5.7	18.6	10.1
	No. Promo.	4	11	0	7	5	0
	* Pct. Promo.	10.3	19.6	0.0	10.1	11.6	0.0

Promo. Cycle Date	Nos. & Ratios	Fem. Wh.	Fem. Bl.	Fem. Other	Male Wh. ,	Male Bl.	Male Other
1976	Tchrs.	6,979	2,077	1,482	1,271	241	226
	No. Appl.	66	127	28	89	57	19
	Pct. Appl.	0.9	6.1	1.9	7.0	23.7	8.4
	No. Promo.	9	11	0	16	7	0
	* Pct. Promo.	13.6	8.7	0.0	18.0	12.3	0.0
1977	Tchrs.	5,892	1,798	1,267	1,162	210	193
	No. Appl.	83	125	29	82	44	19
	Pct. Appl.	1.4	7.0	2.3	7.1	21.0	9.8
	No. Promo.	16	21	0	17	10	0
	* Pct. Promo.	19.3	16.8	0.0	20.7	22.7	0.0
1979	Tchrs.	6,433	2,081	1,648	1,183	240	250
	No. Appl.	126	125	36	59	34	16
	Pct. Appl.	2.0	6.0	2.2	5.0	14.2	6.4
	No. Promo.	33	16	0	10	3	0
	* Pct. Promo.	26.2	12.8	0.0	16.9	8.8	0.0

With one exception (the figures in italics), this table is precisely the same as Petitioner's exhibit, which the Court of Appeals (erroneously) "determined" showed a "prima facie case" of discrimination against white females. (Appendix C to Petition, at p. C7) The only problem with this conclusion is that it is wrong.

The italicized figures demonstrate that white women had a *higher* promotion rate than any other group, based on a proper application of the data. Contrary to Petitioner's method, which compared promotions to the *elementary teacher population*, the italicized line represents the proper comparison: *promotions as compared to applications*.

Examination of Table 1 shows that white women had the highest promotion rate of any group in the 1972 and 1979 examinations. In fact, the overall success rate of white women over the total of these five examinations shows that white females had the highest overall rate of success in being promoted of any group. If the total number of promotions for each group is divided by that group's total number of applications over the five examinations, the overall promotion rate for white females is the highest of any group. Over the five examinations, white females filed 341 applications, and received 75 promotions, for a promotion rate of 21.99 percent. Black females filed 466 applications and received 66 promotions, for a promotion rate of 14.16 percent. White males filed a total of 369 applications and received 63 promotions, for a promotion rate of 17.07 percent, and black males filed 206 applications and received 35 promotions, for a promotion rate of 18.22 percent. It is absurd, in the face of these statistics, to suggest that there is a "prima facie case" of adverse effect against white females, or that white females were "chilled" from applying. Petitioner's own evidence

proves, contrary to her assertions and the Court of Appeals' unsupported conclusion, that (1) there was not even a "prima facie" case, and (2) there was no adverse impact against white females.

C. The Validity Of The T&E Process Was Established.

Respondents' expert, Dr. Friedland, testified as to the validity of the training and experience portion of the examination process. (See Exhibit 217A, Appendix B to this Opposition) As Dr. Friedland testified, he analyzed the T&E component for its job relatedness and concluded that the T&E process was valid and job related. This validation study was performed in accordance with the Uniform Guidelines promulgated by federal agencies.

The Trial Court accepted Dr. Friedland's testimony, adopted his report, and incorporated his conclusions into its Memorandum Opinion. (Appendix A to Petition, p. A38) The Court of Appeals upheld the Trial Court's findings and conclusions on this issue. (See Appendix C to Petition, at pp. C7-9) As this Court has stated: "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson, supra*, 105 S.Ct. at 1513. That is precisely what the Trial Court did in this case. Dr. Friedland's testimony was accepted by the Court, and the methodology that he used was in accordance with all appropriate guidelines and case law.

D. As The Trial Court Determined, There Was No Adverse Impact In The "Direct Appointment" Process; In Any Event, As That Court And The Court Of Appeals Determined, Petitioner's Failure To Obtain A "Direct Appointment" Was Justified By Nondiscriminatory, Job-Related Reasons.

The *only* evidence in the record demonstrating the *credentialed* population is Exhibit 419, which was introduced by Petitioner, but based on information provided by the Respondent District. (A copy of the pertinent page of this exhibit is attached hereto as Appendix D.) *This Exhibit demonstrates that the total female population of the District with administrative credentials was, as of 1984, the time of trial, 56.97%. If there is any relevant population group in the record, this would be it.* The white female population with credentials is listed at 30.87%. Taking the figure 57% female *credentialed* population, an examination of the statistical evidence so highly relied upon by Petitioner in fact becomes a demonstration of nondiscrimination by the Respondent District.

For example, evidence introduced by Petitioner (p. 4 of Ex. 377, a copy of which is attached as Appendix E) demonstrated that the promotions to Assistant Principal, Elementary in the period 1972 through 1980 were as follows: From the list, 55%; direct appointments 57%; total promotions 56%. *These percentages correspond almost exactly to the female credentialed population within the District. Thus, the most pertinent statistics and evidence in the record demonstrate no adverse effect with respect to regular or direct appointments, or the total appointment process, for the period 1972-1980.*

The Court of Appeals was of the opinion that Respondents had "failed to address this aspect of Loftis' allegations." (Appendix C to Petition, at p. C6) Yet the above evidence and argument were presented to both the Trial Court (which obviously accepted it) and the Court of Appeals. Respondents respectfully submit that the Court of Appeals' conclusion is not supportable.

Nevertheless, both the Trial Court and the Court of Appeals determined that there was a legitimate, nondiscriminatory basis for not giving Petitioner a "direct appointment." (See Appendix A to Petition, at p. A20-21; and Appendix C to Petition, at p. C8)

There was no adverse impact in the "direct appointment" process, and Petitioner was not denied such an appointment for an improper reason.

E. The Trial Court's Findings, With Which The Court Of Appeals Agreed, That There Was No Age Discrimination In The "Recency" Requirement Or Any Other Part Of The Process, Are Not "Clearly Erroneous."

As the Trial Court found:

"This Court specifically finds that there has been no statistically proven adverse impact against persons over 40 in the promotional selection process for Assistant Principal, Elementary, from 1972 to the present. (Exh. 220.)" (Appendix A to the Petition, at p. A32)

Additionally and importantly, the Trial Court also found that there had been "enormous changes" in the

District (*id.*, at p. A11), justifying not only Respondents' position on the importance of experience at a "Title I" school (which Petitioner refused), but also the "recency" requirement challenged by Petitioner:

"this [requirement] has been validated as a necessary employment practice. The district has changed considerably in the last 20 years and its requirements and programs have been correspondingly altered." (Appendix A to Petition, at p. A25)

The Court of Appeals upheld these findings and conclusions. (Appendix C to Petition, at p. C9)

V.

THE COURT OF APPEALS DID NOT ENGAGE IN ANY "FACTFINDING."

Petitioner asserts (Petition, at pp. 15-16) that the Court of Appeals violated principles enunciated in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709; 89 L.Ed.2d 739, 106 S.Ct. 1527 (1986). Petitioner appears to misread *Icicle*. Even assuming a proper rule of law was misapplied to a finding, *Icicle* says the Court could have reversed, but does not require it.

If the proper rule of law properly applied to the findings leads to the same result, in the interests of judicial economy it makes little or no sense to reverse. Clearly, the Court of Appeals applied what it viewed as the proper rule of law to the findings and came to the same result as the Trial Court. (See Appendix C to Petition, at p. C8) *Icicle*, which concerned a misapplied notion of *de novo* review, is therefore distinguishable from the present case, where the Court of Appeals consistently applied the "clearly erroneous" standard.

VI.

**THE TRIAL COURT'S DETERMINATION
OF THE PENDENT STATE CLAIMS
SHOULD BE AFFIRMED.**

Petitioner does not to seem to seriously contend that the Court's findings, conclusions, and judgment on these issues are not supported by the record. These findings (Appendix A to Petition, at 19, pp. 27-28) are more than supported by the record and themselves support the judgment. *Molien v. Kaiser Foundation Hospitals*, 27 C.3d 916, 167 Cal.Rptr. 831 (1980); *Cleary v. American Airlines*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980).

CONCLUSION

Based on the foregoing, it is respectfully requested that the Writ be denied.

DATED: November 22, 1989

Respectfully submitted,

RICHARD K. MASON
Counsel of Record

LOS ANGELES UNIFIED
SCHOOL DISTRICT

Attorney for Respondents



APPENDIX A

A. 111497

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EXHIBIT 158

**ANALYSIS OF ADVERSE IMPACT
FOR EXAMINATIONS FOR
ASSISTANT PRINCIPAL ELEMENTARY
FROM 1976 TO 1982**

FPA Friedland
Psychological
Associates, Inc.

**ANALYSIS OF ADVERSE IMPACT FOR
EXAMINATIONS FOR ASSISTANT
PRINCIPAL ELEMENTARY
FROM 1975-76 TO 1981-82**

Statistical results of four different examinations for Assistant Principal Elementary were analyzed to determine whether they showed evidence of adverse impact, as defined in the *Uniform Guidelines on Employee Selection Procedures*. These Guidelines are published by the federal agencies charged with enforcing the provisions of the Civil Rights Act of 1964 which deal with discrimination in employment, and have often been applied by the Courts in evaluating charges of employment discrimination on the basis of race, sex, or national origin.

Data Analyzed

All of the data presented and analyzed in Tables 1, 2, 3, and 4 of this report were taken from exhibit 360, which provides promotional selection statistics for the 1975-76, 1976-77, 1978-79, and 1981-82 examinations for Assistant Principal Elementary.

At the time that exhibit 360 was developed, the eligible list from the 1981-1982 examination for Assistant Principal Elementary was still active. As a result, a number of additional promotions have since been made from this list. Since counsel for the plaintiff have been provided with information on these additional appointments, Table 1a, which takes these additional appointments into account, has been included in this report as an update to Table 1.

The adverse impact analysis presented in this report is based upon the following information from Exhibit 360 and the additional information referred to above:

1. The total number of applicants, of all groups, who competed in each of the examinations, divided by sex.
2. The total number of Black and White applicants who competed in each examination, broken down alternately by race and by sex.
3. The number of male and female applicants, of all groups, who succeeded in passing the examination and were placed on the list of eligibles for promotion.
4. The number of Black and White applicants who were ultimately promoted to Assistant Principal Elementary from each examination. This information was broken down alternately by race and by sex.

Method of Analysis

The analysis procedures used in this investigation are consistent with the requirements of the *Uniform Guidelines on Employee Selection Procedures*, published in 1978. These Guidelines have been adopted by the federal agencies charged with enforcement of the non-discrimination provisions of the Civil Rights Act of 1964, and have often been applied by the Courts in employment discrimination litigation. This analysis is directed toward determining whether the difference between selection rates between two groups is so large that it is unlikely to be the result of chance.

To state this another way, if two groups tend to be equally successful in being selected, their rates of selection in any given examination should be similar. Due to chance, however, it is unlikely that their selection rates will be identical. In evaluating the difference in rates it is necessary to make a judgment concerning whether the difference in rates is large enough to suggest that the groups are being treated differently, or that the selection process is biased. Commonly accepted statistical decision rules used for this purpose are the five percent level of significance and the two to three standard deviation test which was applied in *Castaneda v. Partida* (430 U.S. 482), and *Hazelwood School District v. United States* (433 U.S. 299). Both of these tests were applied in the present analysis to provide the Court with the best possible data on which to evaluate the evidence presented in this report. Of these two tests, the five percent level of significance (based upon a Chi Square statistical test) was given the most weight, because it places a stricter standard on the defendant than does the two or three standard deviation test.

The formula used for the Chi Square analysis was taken from page 204 of Ferguson, G.A. *Statistical Analysis in Psychology and Education*. New York: McGraw Hill, 1966. The formula used for computation of the so-called "Standard Deviation Test" is based on the same formula as that applied in the case of *Castaneda v. Partida*, which is based on estimation of the standard error of a proportion using the binomial theorem. The formula used assumes sampling without replacement from a finite population. This formula was taken from the same Ferguson text, at page 144-146.

While Uniform Guidelines provide for application of a rule of thumb known as the Eighty Percent Rule as a first step in identifying adverse impact, the courts have

tended to prefer application of the more professionally acceptable five percent level or two to three standard deviation tests. This is because the Eighty Percent Rule often suggests the presence of adverse impact when the difference between selection rates is well within the expected range of chance differences (see *Contreras v. City of Los Angeles, CA 9 {1981} aff'd 656 F 2d. 1267; cert den 455 US 1021 {1982}*).

Definition of Adverse Impact

Subsequent to the publication of the *Uniform Guidelines on Employee Selection Procedures* on August 22, 1978, the five federal agencies which authored and adopted the Guidelines published on March 2, 1979 a set of 90 *Questions and Answers on the Uniform Guidelines on Employee Selection Procedures*. These were shortly followed by publication of an additional three questions and answers, bringing the total of questions and answers to 93. The purpose of these, as stated by the agencies was to "... clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures."

The Questions and Answers make it clear that adverse impact is to be determined by comparison of selection rates of groups in question. Selection rates are computed by dividing the number of persons selected from a group by the number of applicants from the group. Question and Answer 17 indicates that males are to be compared with females, and race and ethnic groups with race and ethnic groups. There is no obligation to compare subgroups, such as white females with black males, etc.

Results of Analysis

In the appendix of this report are statistical tables examining the outcome of four examinations for Assistant Principal Elementary held between 1975 and 1982. The Eighty Percent Rule, a Chi Square test of statistical significance, and a standard deviation test (based upon sampling without replacement from a finite population) were applied to the results of each of these examinations. The focus of these analyses was the difference between males and females and between whites and blacks. Results can be summarized as follows:

1. Male vs. Female analysis

- a. The results of the 1978-79 examination showed evidence of adverse impact against males with respect to passing the T&E evaluation and reaching the eligible list. In this examination males reached the eligible list at a rate less than 80 percent that for females, and this difference was statistically significant by both the Chi Square and the Standard Deviation tests.
- b. None of the other examinations evaluated showed significant disparities between men and women.

2. Whites v. Blacks

- a. In the 1978-79 examination, blacks had a significantly lower rate of promotion than did whites, constituting adverse impact as defined by the Uniform Guidelines. The rate of promotion for blacks was less than 80 percent that of

whites, and this difference was statistically significant by both the Chi Square Test and the Standard Deviation Test.

- b. None of the other five examinations showed a significant disparity between blacks and whites.

APPENDIX

Statistical Tables Evaluating Adverse Impact of

Examinations for

Assistant Principal Elementary

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Assistant Principal Elementary 1981-82

Assistant Principal Elementary 1978-79

Assistant Principal Elementary 1976-77

Assistant Principal Elementary 1975-76

Table 1: Assistant Principal Elementary 1981-82

A. Comparison of Males and Females with respect to reaching the eligible list.

	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	108		320				
No. reaching eligible list	24	56					
Pct. reaching eligible list	22.2	17.5		No	1.18	No	1.09

Table 1: Assistant Principal Elementary 1981-82

B. Comparison of promotion rates for males v. females using statistics for Black and White applicants only.

(Blacks and Whites only)	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact	No
Total No. of Applicants	87	262						
No. being promoted	6	26						
Pct. being promoted	6.9	9.9						
			Yes*					
			Male					
						.72	No	.85

* If there were one more male passing in Table B or one more black passing in Table C, there would be no violation of the 80 percent rule (see *Contreras v. Los Angeles*, 656 F 2d. at 1273, Note 4).

Table 1: Assistant Principal Elementary 1981-82

C. Comparison of promotion rates for Whites v. Blacks.

	White (Blacks and Whites only)	Black	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	194	155					
No. being promoted	20	12					
Pct. being promoted	10.3	7.7	Yes*	Black	.68	No	.82

* If there were one more male passing in Table B or one more black passing in Table C, there would be no violation of the 80 percent rule (see *Contreras v. Los Angeles*, 656 F 2d. at 1273, Note 4).

Revised to reflect updated information concerning appointments.

See Tables B and C, below.

Table 1a: Assistant Principal Elementary 1981-82

A. Comparison of Males and Females with respect to reaching the eligible list.

	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact	No
Total No. of Applicants	108	320						
No. reaching eligible list	24	56						
Pct. reaching eligible list	22.2	17.5						

Table 1a: Assistant Principal Elementary 1981-82

B. Comparison of promotion rates for males v. females using statistics for Black and White applicants only.

(Blacks and Whites only)	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	87	262					
No. being promoted	19	43					
Pct. being promoted	21.8	16.8	Yes*			1.13	No

* If there were one less male passing or two more females passing in Table B, there would be no violation of the 80 percent rule (see *Contreras v. Los Angeles*, 656 F 2d. at 1273, Note 4).

Table 1a: Assistant Principal Elementary 1981-82

C. Comparison of promotion rates for Whites v. Blacks.

	(Blacks and Whites only)	White	Black	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	194	155						
No. being promoted	38	25						
Pct. being promoted	19.6	16.1					.70	No

Table 2: Assistant Principal Elementary 1978-79 (July 2, 1979)

A. Comparison of Males and Females with respect to reaching the eligible list.

	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	109	289					
No. reaching eligible list	14	66					
Pct. reaching eligible list	12.8	22.8	Yes Male	4.92	Yes	2.22	Yes Male

Table 2: Assistant Principal Elementary 1978-79 (July 2, 1979)

B. Comparison of promotion rates for males v. females using statistics for Black and White applicants only.

(Blacks and Whites only)	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	92	252					
No. being promoted	13	48					
Pct. being promoted	14.1	19.0	Yes*	Male	1.12	No	1.06

* If there were one more male passing in Table B, there would be no violation of the 80 percent rule (see *Contreras v. Los Angeles*, 656 F 2d. at 1273, Note 4).

Table 2: Assistant Principal Elementary 1978-79 (July 2, 1979)

C. Comparison of promotion rates for Whites v. Blacks.

(Blacks and Whites only)	White	Black	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	183	161					
No. being promoted	41	20					Yes
Pct. being promoted	22.4	12.4	Yes Black	5.85	Yes	2.42	Black

Table 3: Assistant Principal Elementary 1976-77

A. Comparison of Males and Females with respect to reaching the eligible list.

	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	144	238					
No. reaching eligible list	37	55					
Pct. reaching eligible list	25.7	23.1	No	.33	No	.57	No

Table 3: Assistant Principal Elementary 1976-77

B. Comparison of promotion rates for males v. females
using statistics for Black and White applicants only.

(Blacks and Whites only)	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	123		212				
No. being promoted	30		43				
Pct. being promoted	24.4		20.3		No	.77	No

Table 3: Assistant Principal Elementary 1976-77

C. Comparison of promotion rates for Whites v. Blacks.

	(Blacks and Whites only)	White	Black	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	166		169					
No. being promoted	39		34					
Pct. being promoted	23.5		20.1					

Table 4: Assistant Principal Elementary 1975-76

A. Comparison of Males and Females with respect to reaching the eligible list.

	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact	No
Total No. of Applicants	168	218						
No. reaching eligible list	25							
Pct. reaching eligible list	14.9	11.5						
					Yes*			
					Female			
						.98		
						No		.99

* If there were one less male or one more female passing in Table A there would be no violation of the 80 percent rule (see *Contreras v. Los Angeles*, 656 F 2d. at 1273, Note 4).

Table 4: Assistant Principal Elementary 1975-76

B. Comparison of promotion rates for males v. females using statistics for Black and White applicants only.

(Blacks and Whites only)	Male	Female	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	150	190					
No. being promoted	23	20					
Pct. being promoted	15.3	10.5	Yes Female	1.75	No	1.32	No

Table 4: Assistant Principal Elementary 1975-76

C. Comparison of promotion rates for Whites v. Blacks.

(Blacks and Whites only)	White	Black	80% Rule	Chi Square	Stat. Signif	Standard Dev. Test	Adverse Impact
Total No. of Applicants	157	183					
No. being promoted	25	18					
Pct. being promoted	15.9	9.8	Yes Black	2.83	No	1.68	No



APPENDIX B



EXHIBIT 217

**EVALUATION OF THE JOB
RELATEDNESS OF TRAINING AND
EXPERIENCE RATING FACTORS FOR
ASSISTANT PRINCIPAL ELEMENTARY
FOR THE
LOS ANGELES UNIFIED SCHOOL DISTRICT**

FPA Friedland
Psychological
Associates, Inc.

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APPENDICES

APPENDIX A: Task List for Asst. Principal Elementary
APPENDIX B: Duty List for Asst. Principal Elementary
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[APPENDICES TO REPORT NOT INCLUDED
IN THIS OPPOSITION BRIEF]

**Evaluation of the Job Relatedness of
Training and Experience Rating factors for
Assistant Principal Elementary
Los Angeles Unified School District**

The present investigation was designed to evaluate the job relatedness of the factors used in the Training and Experience evaluation segment of the promotional examination for Assistant Principal Elementary. The rating factors used on the Training and Experience (T&E) rating form are the same as those used for Principal Elementary.

In order to evaluate the job relatedness of the rating factors, an investigation was conducted in which subject matter experts (SMEs) were asked to: 1) Rate each of the training and experience rating factors with respect to its degree of importance, and the degree to which the factor differentiates superior from average candidates for Assistant Principal; and 2) Indicate the duties of the job for which each factor is essential.

RATIONALE FOR THE INVESTIGATION

In any analysis of job relatedness it is necessary to take steps to ensure data gathered are meaningful and objective. Since the present investigation was conducted after the examination had been developed and placed in use, it was felt that safeguards were needed to ensure objectivity on the part of the SMEs concerning the job relatedness of the T&E process. In order to accomplish these safeguards, the following steps were taken:

1. A previously-conducted job analysis was used to avoid the possibility that knowledge of the lawsuit on the part of SMEs might lead to bias in the job analysis results. The job analysis chosen for use

was conducted in 1980 and 1981 by research staff of the Los Angeles Unified School District. This job analysis was a comprehensive one, involving virtually all Principals and Assistant Principals in the District as SMEs. Job analysis questionnaires were sent to all incumbent Principals and Assistant Principals, with 75 percent of the questionnaires being returned for analysis.

2. The procedures used in the present study to evaluate the job relatedness of rating factors on the T&E form were designed to ensure that each SME provided individual input independent of other SMEs. Consensus among SMEs was evaluated to determine the job relatedness of the T&E factors. The means by which this was accomplished is described below.

PROCEDURES

Job Analysis

The job analysis data used in the present investigation were taken from the 1980-81 study mentioned above, which was conducted by research staff of the Los Angeles Unified School District. This job analysis was a very extensive one involving a comprehensive list of tasks covering Principal and Assistant Principal jobs in elementary, junior high, and high school positions. Job analysis questionnaires were distributed to all Assistant Principals and Principals in all elementary, junior high, and high schools in the District. Questionnaires were filled out and returned by 61 Assistant Principals Elementary.

The task list used in the present analysis consisted of all tasks having an average rating of three or higher on a five-point scale based upon ratings of the 61 Assistant

Principals Elementary who completed job analysis questionnaires in the 1980-81 study. The scale used in rating the tasks in the job analysis included a range from one to five, with one being "not critical"; two, "slightly critical"; three, "moderately critical"; four, "critical"; and five, "very critical". The tasks for Assistant Principal Elementary were grouped into 20 duties, each of which encompassed from 2 to 15 related tasks. By including only those tasks with an average of three or higher, tasks which were related as less than "moderately critical" were excluded.

Subject Matter Experts

The subject matter experts (SMEs) used in the present investigation of the T&E process for Assistant Principal Elementary included 24 individuals. Fifteen of these were Assistant Principals, while nine were Principals. The group included 12 males and 12 females. Of these there were 9 white, 6 black, 5 hispanic, and 4 Asian.

T&E Rating Factors

The T&E rating factors to be evaluated were taken from form 4108-3, dated May, 1978. The 36 rating factors listed on this form were used for both Assistant Principal Elementary and Principal Elementary examinations. The factors were grouped into six categories as follows:

1. Professional Skills
2. Organization and Management Skills
3. Human Relations
4. Communication Skills

5. Community Participation

6. Academic Preparation

Rating and Duty Linkage Procedures

The 24 SMEs were gathered together for a meeting on May 2, 1984 to evaluate the job relatedness of the T&E process for Assistant Principal Elementary. They were not told in advance of the purpose of the meeting, except in very broad terms. At the meeting, the SMEs were told that the purpose of the meeting was for them to evaluate the job relatedness of the rating factors used in the T&E process for Assistant Principal Elementary, and that they were to accomplish this by means of a set of rating procedures. The SMEs worked individually in accomplishing their ratings and were supervised at all times by Dr. David Friedland, of Friedland Psychological Associates, Inc. They were asked to perform their analysis through the following steps:

1. *Review of tasks, duties, and rating factors:* The SMEs were asked to thoroughly read the list of tasks obtained from the 1980-81 job analysis study (see Appendix A). The purpose of this step was to familiarize them with the specific tasks listed. They were told that each of the duties under which tasks were grouped was to be thought of as being defined by the tasks listed for that duty. For example, duty number two, dealing with developing budgets and regulating expenditures of funds, was to be thought of as including only those tasks actually performed by Assistant Principals Elementary. Thus, the duty of developing budgets and regulating expenditures of funds was defined by only three tasks: 1) studying budget guidelines to determine funds available; 2) directing needs assessment proce-

dures with staff, parents and community, including establishment of appropriate budget committee; and 3) determining priorities for expenditure of funds based upon needs assessment. In contrast, this duty for Principal Elementary included eleven tasks, since Principals have greater budget responsibility than do Assistant Principals.

Thus, SMEs were instructed to consider each duty statement as being defined by those tasks included in it. The SMEs were not asked to rate or evaluate the importance of the tasks, since this had already been done in the 1980-81 job analysis study.

2. *Rating of the T&E Factors to Determine Importance and Appropriateness as Ranking Criteria (see Appendix C):*

- a. *Rating on Scale A — Importance:* The SMEs were asked to rate the 36 T&E rating factors with respect to their importance for performance of the job of Assistant Principal Elementary. These ratings were done on a 5-point scale. The points on the scale were defined as follows: 1) of little or no importance; 2) Helpful, but not critical; 3) important, must possess to some degree; 4) critical, must possess or serious problems will result; and 5) essential, cannot be successful without this factor. In analysis of the ratings provided by the SMEs in this step, a rating factor was considered important if it had an average rating of three or higher on this scale.
- b. *Rating on scale B — Distinguishing Superior Performers:* Each of the T&E rating factors was rated by the SMEs with respect to the

degree to which it differentiates more effective performers from less effective ones on a 5-point scale. Points on the scale were defined as follows: 1) not important; 2) does not distinguish beyond a minimal level; 3) better employees usually possess greater proficiency in this factor; 4) employees possessing higher levels of this factor usually perform at an outstanding level; and 5; outstanding employees almost always possess high levels of this factor.

This rating is relevant to the question of whether a given factor is useful for ranking candidates for promotion. Rating factors used to rank individuals for promotion should measure characteristics which differentiate more effective from less effective employees.

3. *Duty Linkage Procedures (see Appendix C):* Duty linkage was a key step in determining whether each T&E factor was job related. The procedure followed by the SMEs in this step was a simple one. They were asked to list for each of the 36 T&E factors up to five duties from the duty list for which the factor provides essential preparation. It was emphasized that they were only to choose those duties for which the factor is centrally important. The SMEs were allowed to choose from zero to five duties for each T&E factor, and to list them in priority order from the most directly related to the least directly related. In this step, as in all steps of the present investigation, the SMEs worked independently, with no discussion among themselves.

RESULTS OF THE JOB RELATEDNESS INVESTIGATION

The results of the SME ratings were analyzed to determine the degree of job relatedness of the T&E rating procedures. Table 1, below shows the results of analysis of the ratings on scales A and B, concerning importance and differentiation of more effective performers.

Table 1: Mean importance and superior performer ratings for T&E factors for
Assistant Principal Elementary.

FACTORS	MEAN RATINGS		
	Importance	Distinguish Superior	
		4.17	4.17
1. Success and experience as a classroom teacher.	4.17	4.17	4.17
2. Variety of experience with students of differing socio-economic, ethnic, and cultural backgrounds.	4.13	3.71	3.71
3. Participation in special programs (remedial, ESL, handicapped, etc.)	2.83	2.79	2.79
4. Involvement in innovative teaching practices.	3.38	3.67	3.67
5. Skill in analysis and interpretation of testing programs.	3.67	3.54	3.54
6. Evidence of proficiency in counseling and guidance.	4.00	3.92	3.92
7. Participation in curriculum development.	4.00	3.96	3.96
8. Skill in supervision of instruction.	4.46	4.42	4.42
9. Proficiency in related administrative responsibilities (department chairman, coordinator, registrar, etc.)	3.46	3.42	3.42
10. Leadership in educational organizations, workshops, etc.	2.79	2.96	2.96
11. Effectiveness in preparing and organizing schedules, reports, staff assignments, etc.	3.96	3.63	3.63

MEAN RATINGS
FACTORS

	Importance	Distinguish	Superior
12. Skill in delegating responsibilities.	4.17	4.04	
13. Efficiency in management of supplies and equipment.	3.46	3.21	
14. Ability to budget and administer funds.	3.96	3.58	
15. Familiarity with modern office procedures.	3.42	3.25	
16. Initiative in arranging student activities (assemblies, contests, drives, etc.)	3.21	3.08	
17. Skill in establishing and functioning within appropriate line-staff relationships.	4.21	4.04	
18. Ability to identify problems, assign and work within valid priorities.	4.42	4.46	
19. Ability to resolve conflicts and reduce tensions.	4.67	4.71	
20. Evidence of personal regard by students, parents, faculty.	3.96	4.08	
21. Sensitivity to factors which are related to student success in school.	4.58	4.54	
22. Sensitivity to the needs of the community and the ability to interpret them to the school.	4.46	4.50	
23. Evidence of building morale within the school.	4.25	4.42	
24. Evidence of interpreting the goals of the school to the community.	4.08	4.04	

F A C T O R S	M E A N R A T I N G S		
	Importance	Distinguish	Superior
25. Ability to write bulletins, correspondence, reports.	3.96	3.83	
26. Skill in communicating with students and parents.	4.71	4.42	
27. Effectiveness in speaking before large groups, conducting meetings, and participating in group discussions.	4.13	4.04	
28. Ability to exchange ideas with the faculty.	4.63	4.58	
29. Evidence of working with youth groups.	2.88	2.71	
30. Participation in neighborhood associations and civic action groups.	2.29	2.29	
31. Involvement in service groups, charity drives, etc.	2.21	2.25	
32. Use of community resources in the school program.	2.96	3.04	
33. Breadth and depth of training.	3.96	3.67	
34. Appropriateness of training.	4.00	3.83	
35. Recency of training.	3.42	3.25	
36. Professional growth.	3.71	3.63	

It can be seen in Table 1, that 31 of the 36 T&E factors had average importance ratings of 3 or greater. Factors 3, 10, 29, 30, and 31 had average importance ratings less than 3. It can also be seen from this table that factors 3, 29, 30, and 31 had average ratings less than 3 on the superior performer rating. While the ratings for factors 3, 10, and 29 have averages less than 3, they are highly rated enough to suggest a moderate level of importance. The average ratings for factors 30, and 31, however, are considerably lower. In reviewing the content of these two factors, it can be seen that they deal with involvement with activities which do not directly relate to school work.

The above results suggest that 31 of the 36 T&E factors are clearly important to success as an Assistant Principal Elementary, and three (numbers 3, 10, and 29) are of substantial, though somewhat lesser importance. Two of the factors (numbers 30 and 31) are of questionable importance. The ratings on the criterion of differentiating superior performers suggest that all factors except 3, 29, 30, and 31 are appropriate for use in ranking candidates for Assistant Principal Elementary.

Analysis of Linkage of Factors With Duties

It was assumed in analyzing the results of this step in the investigation that if a given T&E factor was job related, the SMEs would tend to agree with one another in choosing the duties which require that factor for their performance. To the extent that a T&E factor is not job related, the SMEs should either fail to find any duties which require the factor or disagree with respect to which duties require the factor. In the case of Assistant Principal Elementary, since there were 20 duties listed, any given duty would have one chance in four of being chosen at random by an SME selecting five duties at random.

The Binomial Theorem was used in analyzing the results of the linkage ratings. It was determined that if there were truly no relationship between the T&E factors and the duties of the job, there was a statistical probability of less than one in one thousand that 13 or more of the 24 SMEs would link a given duty with a given T&E factor. This analysis assumes that if a T&E factor is not job related, the SMEs would be able only to link it with particular duties on a random basis. The most commonly used level of statistical significance in validity analysis is the five percent level. The standard used in the present analysis was the one tenth of one percent level, which is considerably more conservative.

The SMEs were asked to evaluate all factors for linkage except for factors 33 through 36. These latter factors deal with broad issues such as breadth, appropriateness, and recency of education, and professional growth. Such factors are not amenable to application of the linkage procedure, so their job relatedness must be evaluated by their importance ratings. The results of analysis showed that all factors met the standard of agreement of 13 or more of the 24 SMEs. Only factor 29, evidence of having worked with youth groups, failed to be linked to any duty by at least 13 of the SMEs.

CONCLUSIONS

As a result of the above analysis, it is concluded that the factors used in the T&E process for Assistant Principal Elementary are job related, as evidenced by a high level of agreement among SMEs independently evaluating the relationship between the factors and the duties of Assistant Principal Elementary.

In addition, the results demonstrate that the factors address qualities important to successful performance, and which are appropriate for use in ranking individuals for selection.

END

**[APPENDICES TO REPORT NOT INCLUDED
IN THIS OPPOSITION BRIEF]**



APPENDIX C

1100-57

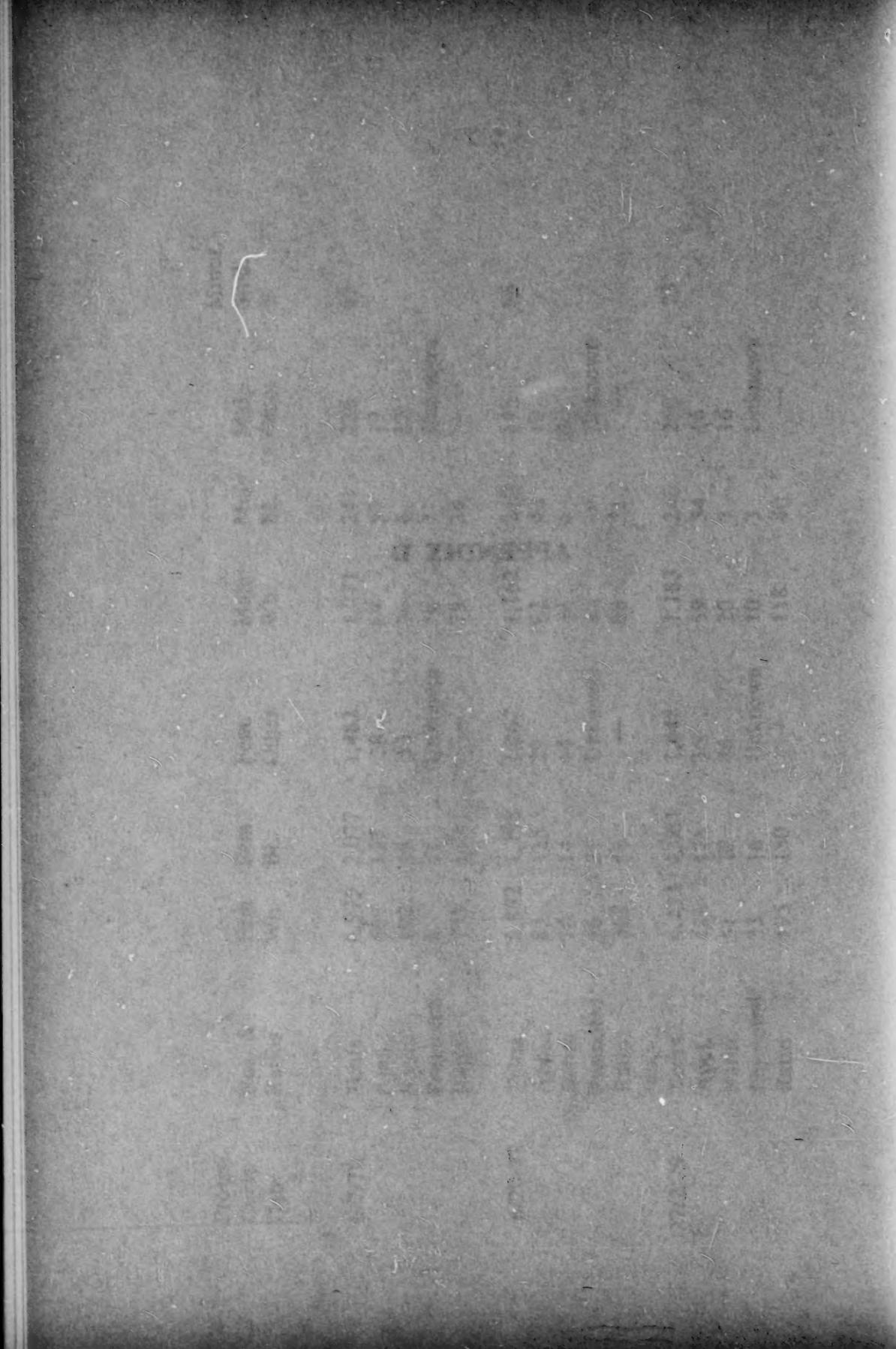
**APPLICATIONS AND PROMOTIONS, ASSISTANT PRINCIPAL,
ELEMENTARY SCHOOL ("APES"), 1972-1979**

From Petitioner's Brief Before The Court Of Appeals (p. 20)
(Drawn From Various Exhibits)

Promo. Cycle Date	Nos. & Ratios	Fem. Wh.	Fem. Bl.	Fem. Other	Male Wh.	Male Bl.	Male Other	Minor. Stud. %
6/19/72	Tchrs.: Appl.: Ratio:	7,388 27 274	1,863 33 56	1,000 9 111	1,265 70 18	236 28 8	136 17 8	54
	Promoted: Ratio:	13 568	7 266	Unknown —	13 97	10 24	Unknown —	
5/13/74	Tchrs.: Appl.: Ratio:	7,099 39 182	2,158 56 39	1,624 18 90	1,213 69 18	231 43 5	247 25 10	58
	Promoted: Ratio:	4 1,775	11 196	Unknown —	7 173	5 46	Unknown —	

Promo. Cycle Date	Nos. & Ratios	Fem. Wh.	Fem. Bl.	Fem. Other	Male Wh.	Male Bl.	Male Other	Minor. Stud. %
6/7/76								
Tchrs.:	6,979	2,077	1,482	1,271	241	226	63	
Appl.:	66	127	28	89	57	19		
Ratio:	102	16	53	14	4	12		
Promoted:	9	11	Unknown	16	7	Unknown		
Ratio:	775	189	—	79	34	—		
6/20/77								
Tchrs.:	5,892	1,798	1,267	1,162	210	193	66	
Appl.:	83	125	29	82	44	19		
Ratio:	70	14	44	14	5	10		
Promoted:	16	21	Unknown	17	10	Unknown		
Ratio:	368	86	—	68	21	—		
7/2/79								
Tchrs.:	6,433	2,081	1,648	1,183	240	250	73	
Appl.:	126	125	36	59	34	16		
Ratio:	51	17	46	20	7	16		
Promoted:	33	16	Unknown	10	3	Unknown		
Ratio:	195	130	—	118	80	—		

APPENDIX D



LAUSD ADMINISTRATIVE CREDENTIALS AND POSITIONS
EXHIBIT 419, p. 1

CREDENTIALS, ADMINISTRATIVE		POSITIONS ACTUALLY HELD: ELEM. ASSIST. PRINCIPAL, 1980	
#	%	#	%
MALE WHITE	1,354	29.54	29
FEMALE WHITE	1,415	30.87	29
SUBTOTAL	2,769	60.42	58
MALE BLACK	273	5.96	12
FEMALE BLACK	730	15.93	25
SUBTOTAL	1,003	21.88	37
MALE 'OTHER'	345	7.52	13
FEMALE 'OTHER'	466	10.17	15
SUBTOTAL	811	17.70	28
TOTAL MALE	1,972	43.03	54
TOTAL FEMALE	2,611	56.97	69
GRAND TOTAL	4,583	100.00	123

'OTHER' = HISPANIC, ASIAN, PACIFIC ISLANDER, AMERICAN INDIAN

APPENDIX E

3. 2000000000

ADVERSE IMPACT OF ADMINISTRATIVE EXAMINATIONS 1972 — PRESENT
EXHIBIT 377, p. 4

CLASS	APPLICANTS		ASSIGNMENTS		SELECTION RATE (%)		NON-LIST APPOINTMENTS	
	M	F	M	F	M	F	M	F
D.A.A./Area Coord.	181	47	18	5	10.0	10.6	5	
Asst. Princ., Adlt. Ed	139	69	25	12	18.0	17.4	1	
Elem. Princ.	379	220	126	81	33.2	36.8	44	28
Sec. Princ.	276	126	45	15	16.3	11.9(n.s.)	9	2
Asst. Princ., Elem.	671	928	103	127	15.4	13.7(n.s.)	29	38
Asst. Princ., Second.	678	473	61	63	9.0	13.3	11	24
Princ., Adlt., Ed.	83	12	9	0	10.8	0.0(n.s.)	1	
TOTAL	2407	1875	387	303	16.1	16.2	99	93

n.s. — no statistically significant difference in selection rates.



No.
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

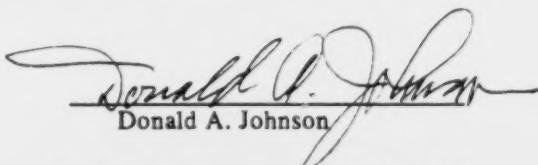
SHIRLEY LOFTIS,
Petitioner,
vs.
LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

SPENCER E. COVERT
PARKER AND COVERT
Suite 312
1901 East Fourth Street
Santa Ana, CA 92705

That affiant makes this service, for RICHARD K. MASON, Counsel of Record, LOS ANGELES UNIFIED SCHOOL DISTRICT, Attorney for Respondents herein, and that to the best of my knowledge all the persons required to be served in said action have been served.


Donald A. Johnson

On November 22, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.




Theodore Matsuo Wilden
Notary Public in and for
said county and state